

Supreme Court of the United States

October Term, 1965

CROWN COAT FRUIT CO., INC., Petitioner,

UNITED STATES OF AMERICA

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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IN THE
Supreme Court of the United States

October Term, 1966

No.

CROWN COAT FRONT CO., INC., *Petitioner*,

v.

UNITED STATES OF AMERICA

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioner, Crown Coat Front Co., Inc., prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 22, 1966.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (App., *infra*, p. 27) is not reported. The opinion of the Court of Appeals for the Second Circuit (App., *infra*, p. 8) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered June 22, 1966. The jurisdiction of this Court is invoked pursuant to the provision of 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the running of the statutory limitation period was tolled during the pendency of the administrative proceeding under the standard Government contract disputes clause.

STATUTORY AND CONTRACT PROVISION INVOLVED

1. The Act of June 25, 1948, 62 Stat. 971, 28 U. S. C. 2401(a) provides:

"§2401. Time for commencing action against United States.

"(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

2. The Disputes Article of the contract here involved provides (App., *infra*, pp. 11, 29) :

"Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall

reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

STATEMENT

On May 14, 1956 petitioner entered into a contract with respondent to manufacture and deliver 89,786 felt canteen covers for a total agreed price of \$60,691.76. The contract called for the use of mildew resistant felt made in accordance with certain established specifications and provided for the submission of samples to the Government for testing and inspection, prior to manufacture; and stipulated that if these samples did not meet specifications the Government had "the right either to reject them or to require their correction." (App. pp. 10, 27). The contract included a standard "disputes" clause which required that "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided" by the Contracting Officer, from whose decision an appeal could be taken to the Armed Services Board of Con-

tract Appeals. After making laboratory tests of four lots of samples submitted by petitioner for testing and inspection the Government rejected the samples and upon a price reduction of \$.005—a total of \$270.01—the canteen covers made from allegedly non-conforming felt were accepted by the Government. Final delivery was made December 14, 1956 (App. pp. 11, 27). Petitioner claims that it was not until nearly five years later that it first learned the Government had improperly tested the samples by submitting them to a different test than contemplated by the contract. Thereupon, on October 4, 1961 petitioner wrote the Contracting Officer and demanded refund of the price adjustment of \$270.01 and an equitable adjustment for the increased extra production costs resulting from the initial rejection of the samples. On February 21, 1962 the Contracting Officer issued a decision in which he found that the Government had determined by "an established commercial test method" that the felt samples were nonconforming and that the price reduction was proper. By opinion dated February 28, 1963 the ASBCA affirmed the Contracting Officer's denial of the claim. On July 31, 1963, five months after the ASBCA decision, but more than six years after the December 14, 1956 final delivery of canteen covers and presentation of the final invoice, petitioner brought this action under 28 U. S. C. 1346(a)(2) in the United States District Court for the Southern District of New York to recover compensation for the extra production costs and the \$270.01 price reduction. The District Judge dismissed the complaint holding that it was barred by the six-year limitation contained in 28 U. S. C. 2401(a) (App., *infra*, p. 32). Petitioner appealed to the Court of Appeals for the Second Circuit. The appeal was argued October 5, 1965 before a panel composed of Judges Waterman, Hays and Anderson.* While the case was *sub judice* before the panel, the active circuit judges, on December 6, 1965, voted to consider the case *en banc* without

* *Northern Metal Co. v. United States*, 350 F. 2d 838 (3 Cir. Aug. 27, 1965), was then available in slip form and was the subject of oral argument by counsel and comment by the Court.

further briefs or oral argument (App., *infra*, p. 9). On June 22, 1966, by a divided court, the judgment of the District Court was affirmed (App., *infra*, p. 21). The opinion per Waterman, Circuit Judge, with whom Judges Lumbard, Moore and Smith concurred, was for affirmance on the authority of *States Marine Corp. v. United States*, 283 F. 2d 776 (2-Cir. 1960) (App., *infra*, p. 20). Judge Friendly concurred in a separate opinion on the precedent of *States Marine*, with, but for the precedent, an inclination toward Judge Anderson's dissent (App., *infra*, p. 21) and Judge Anderson dissented in a separate opinion with which Judges Kaufman, Hays and Feinberg concurred, on the authority of *Northern Metal Co. v. United States*, 350 F. 2d 833 (3 Cir. 1965) (App., *infra*, p. 26).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' decision is in conflict with a decision of another Court of Appeals on the same matter. The decision of the Court below in the instant case and in *States Marine Corp. v. United States*, 283 F. 2d 776 (2 Cir. 1960), upon the authority of which the instant case was decided, are directly in conflict with the decision of the Third Circuit Court of Appeals in *Northern Metal Co. v. United States*, 350 F. 2d 833 (3 Cir. 1965). This conflict was the reason why this case, after having been argued before a panel of three Circuit Judges, was referred for adjudication to the nine active Judges of the Court of Appeals for the Second Circuit (App., *infra*, p. 9). This conflict was conceded by the Court below both in the opinion by Waterman, Circuit Judge (App., *infra*, p. 15), in the concurring opinion by Friendly, Circuit Judge (App., *infra*, p. 21), and in the dissenting opinion by Anderson, Circuit Judge (App., *infra*, p. 21). In his concurring opinion, Judge Friendly said that the issue, on which the conflict existed, could be settled once and for all by this Court (App., *infra*, p. 21). The issue involved is a recurring one suffi-

ciently important to warrant authoritative pronouncement by this Court.

2. The case poses the important question whether the statute of limitations on a suit for equitable adjustment under a Government supply contract is tolled during the pendency of the administrative proceedings required by the standard contract disputes clause. The standard contract disputes clause has frequently received the Court's attention. In *United States v. Carlo Bianchi & Co.*, 373 U. S. 709 (1963), the Court held that, aside from questions of fraud, a reviewing Court is limited to the administrative record made below in determining the finality to be given departmental decisions in findings made by a Board of Contract Appeals pursuant to the standard contract disputes clause. In *United States v. Anthony Grace & Sons, Inc.*,

U. S. , June 6, 1966, the Court held that the Board of Contract Appeals acting under a standard contract disputes clause and not the reviewing Court, should make the original recommendation on an issue which the Board did not resolve because it erroneously dismissed the appeal as untimely. In *United States v. Utah Construction and Mining Co.*, U. S. , June 6, 1966, the

Court held that the standard disputes clause excluded breach of contract claims from its coverage and that administrative findings in the course of adjudicating claims within the disputes clause were not to be retried in a judicial proceeding but to be reviewed by the Court on the administrative record. In *United States v. Holpuch*, 328 U. S. 234, 239, 243 (1946); *United States v. Blair*, 321 U. S. 730, 734-737 (1944), the Court held that the administrative procedure required by the contract disputes clause must be exhausted before bringing suit for judicial relief.

This case presents the issue whether the administrative proceedings required by the contract disputes clause and to be exhausted before resort to judicial relief, tolls the running of the statute of limitations during its pendency. This important issue, a recurring one, should be considered by the Court.

3. The case poses the further important question whether, while an administrative proceeding under the standard contract disputes clause is pending, a protective suit must be instituted to stay the statute of limitations. In his opinion (App., *infra*, p. 20), Waterman, Circuit Judge, said that if a claimant is uncertain whether to resort to administrative proceedings or to institute judicial proceedings, he may protect himself by instituting a "protective suit" within the six-year period permitted by the Tucker Act, staying its progress until after a final administrative decision, and then bringing it forward if the administrative decision is adverse to him. In his dissenting opinion Judge Anderson (App., *infra*, p. 25) stated his belief that this was not a satisfactory solution to the problem since such a procedure would eventually lead to the defeat of many legitimate claims in the case of claimants unaware of protective actions and would have the unfortunate effect of increasing the burden of the district courts and as a matter of sound judicial administration had little to commend it. In *Northern Metal Co. v. United States*, *supra*, 350 F. 2d at page 839, Circuit Judge Freedman, writing for the Third Circuit, said that the dockets of the courts are too crowded for Congress to have intended that suits must be brought while the Governmental tribunal is engaged in ascertaining the facts which will determine whether the Government will pay the claim. In *United States v. Dickinson*, 331 U. S. 745, 749 (1947), the Court looked with disfavor upon piecemeal or premature litigation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a writ of certiorari should be granted.

EDWIN J. McDERMOTT
Attorney for Petitioner

APPENDIX**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 34—September Term, 1965.

(Argued October 5, 1965
Submitted to the *in banc*
court December 9, 1965

Decided June 22, 1966.)

Docket No. 29710

CROWN COAT FRONT CO., INC.,
Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,
Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*, and
WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN,
HAYS, ANDERSON and FEINBERG, *Circuit Judges*

Appeal from summary judgment, entered on Government's cross-motion, by the United States District Court for the Southern District of New York, Ryan, *Chief Judge*.
Affirmed.

EDWIN J. McDERMOTT, Philadelphia, Pa. (Jasper I. Manning, New York City, on the brief), *for Plaintiff-Appellant*.

ARTHUR M. HANDLER, Asst. U. S. Atty., Southern District of New York (Robert M. Morgenthau, U. S. Atty., and Alan G. Blumberg, Asst. U. S. Atty., Southern District of New York, on the brief), *for Defendant-Appellee*.

WATERMAN, *Circuit Judge* (with whom Judges Lumbard, Moore and Smith concur; Judge Friendly concurs in a separate opinion; Judge Anderson dissents in a separate opinion with whom Judges Kaufman, Hays, and Feinberg concur):

Plaintiff-appellant, on July 31, 1963, commenced its action against the United States in the United States District Court for the Southern District of New York. After the Government answered, pleading among other things that the action was time-barred, both parties moved for summary judgment. The court below granted the Government's motion and dismissed the complaint on the ground that the complaint had not been filed within six years after plaintiff's cause of action had accrued. 28 U.S.C. §2401(a). Plaintiff's appeal from the dismissal was heard by a panel of this court composed of Judges Waterman, Hays and Anderson, and while the case was *sub judice* before the panel the active circuit judges, on December 9, 1965 voted to consider the case *in banc* without further briefs or oral argument. The thrust of appellant's claim on appeal is that it was required fully to exhaust the administrative remedies it had agreed to pursue under the "disputes clause" of its contract before it could institute a suit against the United States, and that, having filed its suit within six years after the final decision in the matter by the Armed

Services Board of Contract Appeals, it had therefore filed within six years from the date that its right of action accrued.¹

The Government, meeting this thrust, briefed its case on the sole issue whether, "pursuant to 28 U.S.C. §2401 (a), a contractor's 'right of action' against the Government 'first accrues' (i) on the date of the alleged breach of contract by the Government, or (ii) on the date of a decision of the ASBCA denying the contractor's claim."

On May 14, 1956 the appellant entered into a contract with the Government to manufacture and deliver 89,786 felt canteen covers for a total agreed price of \$60,691.76. The contract called for the use of mildew-resistant felt, made in accordance with certain established specifications, and provided for the submission of samples to the Government for testing and inspection, prior to manufacture. It also stipulated that if these samples did not meet specifications, the Government had "the right either to reject them or to require their correction." In addition, the agreement included the standard "disputes" clause which required

¹ Appellant's brief sets forth the questions involved as follows:

"1. Where the 'Changes' clause of the contract provides that any failure to agree to a contract price adjustment is a dispute concerning a question of fact within the meaning of the 'Disputes' clause, and the 'Disputes' clause provides a procedure for the settlement of disputes arising under the contract, must not the contractor pursue such administrative remedy and secure a final decision thereof before he may institute suit? Negatived by the Court below.

"2. Where the plaintiff-appellant brings suit within the statutory period of six years after the final decision of the Armed Services Board of Contract Appeals under the 'Disputes' article of the contract, is plaintiff-appellant barred by the statute of limitations? Affirmed by the Court below."

In its reply brief, filed August 27, 1965, appellant reiterated the position that "Since plaintiff-appellant's suit was filed within six years from the date that its right of action accrued, it was timely," and that it "could not have sued until the decision of the Armed Services Board of Contract Appeals was rendered on February 28, 1963."

that, in the first instance, "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided" by the Contracting Officer, from whose decision an appeal could be taken to the Armed Services Board of Contract Appeals (ASBCA).²

In accordance with the contract, appellant submitted four lots of felt samples for testing and inspection. After making laboratory tests in October and November, 1956, the Government rejected the samples. Thereupon the appellant requested, and the Government agreed to accept, the delivery of the canteen covers made from the non-conforming felt. A contract modification of \$.005 less per unit—a total of \$270.01—was agreed upon. Final delivery was made on December 14, 1956, and in all other respects the modified contract was fully performed.

The appellant claims that it was not until nearly five years later that it first learned the Government had im-

² Such a clause is required for most government contracts. See 32 C. F. R. §7.103-12 and 32 C. F. R. §596.103-12. The clause in question in this case reads as follows:

"Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

properly tested the samples by submitting them to a different test than contemplated by the contract. On October 4, 1961, appellant's counsel wrote the Contracting Officer and demanded (1) a refund of the \$270.01 price adjustment, and (2) an equitable adjustment for alleged increased extra production costs resulting from the initial rejection of the samples. On February 21, 1962, the Contracting Officer filed a decision in which he found that the Government had determined by "an established commercial test method" that the felt samples were nonconforming, and that the price reduction was proper. By opinion dated February 28, 1963, the ASBCA affirmed the Contracting Officer's denial of the claim. On July 31, 1963, five months after the ASBCA decision; but more than six years after the December 14, 1956 final delivery of canteen covers and presentation of the final invoice, appellant brought this suit under the Tucker Act, 28 U. S. C. §1346(a) (2), demanding the \$270.01 and a sum "not exceeding \$10,000 as the court may deem just and equitable" as compensation for the alleged extra production costs. As stated above, on cross-motions for summary judgment the district judge dismissed the complaint, holding that it had been time-barred by the six year limit³ within

³ Section 1346(a) (2) of Title 28 U. S. Code derives from the so-called Tucker Act, the Act of March 3, 1887, 24 Stat. 505, c. 359, entitled "An act to provide for the bringing of suits against the Government of the United States." It presently reads:

"§1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The Tucker Act was a comprehensive statute and also included

which Congress had authorized suspension of the Government's sovereign immunity from suit.⁴ This appeal followed. We affirm the district court.

At the outset we agree with the finding of the court below that the alleged breach of the contract occurred at the very latest on December 14, 1956. That was the date of the final delivery of the canteen covers found to be nonconforming by the use of a test not contracted for. The right of action against the Government accrued at the time of the breach of the agreement by the Government and not at some later time. This would appear to be settled by *McMahon v. United States*, 342 U. S. 25, 72 Sup. Ct. 17, 96 L. Ed. 26 (1951) where the Supreme Court held in a much more appealing case that a seaman's claim for injuries arose when he was injured, and not when his claim had been finally administratively disallowed. The Court specifically rejected both the contention that the seaman could not sue until disallowance and that he had no cause of action until then. As the Court pointed out, even where statutes are to be con-

among other provisions a predecessor provision to the present 28 U. S. C. §2401(a), which now reads:

"§2401. Time for commencing action against United States.

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

⁴ We should make mention that the appellant, as a third string to its bow, attempted unsuccessfully to convince the district court that if, despite appellant's arguments otherwise, the six-year period began to run prior to the final administrative order, it began to run at a date later than December 14, 1956, on November 14, 1962. On this date the appellant received a refund from the Government of \$646.06 which the ASBOA had determined in a different proceeding had been erroneously deducted as prompt payment discounts the Government should not have withheld. As will appear from our later discussion herein we agree with the district court that there is no merit to this contention.

strued liberally for the benefit of seamen, "it is equally true that statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign," *supra* at 27. Hence there the two year period of limitation built into the Suits in Admiralty Act⁵ was held to begin to run as of the date of the injury.

Following *McMahon*, and after the passage of the Wunderlich Act, May 11, 1954, c. 199, 68 Stat. 81, 41 U. S. C. §§321-322, we, in *States Marine Corp. v. United States*, 283 F. 2d 776 (2 Cir. 1960) ruled against a libellant who claimed that the Government in December 1954 had breached a contract with it. We so ruled because the plaintiff's libel had not been filed until September 1957, even though during 15 months of the elapsed 33 months the contractor's claim had been under consideration, first by the Contracting Officer and then by the ASBCA, pursuant to a "Disputes" clause in the contract like the "Disputes" clause in appellant's contract.⁶

In fact, in *States Marine* we disposed of every claim appellant makes here. We held that the contractor should not await final decision of the ASBCA, in accord with his agreement to submit disputes to the agency officers, before commencing a protective suit, and that the time-bar period did not begin to run from the time of the final decision of the ASBCA, but, as the right of action accrued at the time of the breach, the time-bar began to run then. Moreover, we held, *supra* at 779, that the running of the time-bar was not tolled during the period when the claim was under administrative consideration.

Unless a reason exists for differently treating a suit brought pursuant to the permission granted by the Tucker Act from a suit brought pursuant to the permission granted by the Suits in Admiralty Act, we would be required to

⁵ Section 5 of the Suits in Admiralty Act, March 9, 1920, c. 95, 41 Stat. 525; 46 U. S. C. §745.

⁶ See footnote 2, *supra*, and footnote 1 in *States Marine Corp. v. United States*, *supra* at 777.

overrule the law of this circuit laid down in *States Marine* and reaffirmed in *Isthmian S. S. Co. v. U. S.*, 302 F. 2d 69 (2 Cir. 1962) if we were to grant relief to the appellant here.

After final briefs had been filed by the parties the Third Circuit handed down its opinion in *Northern Metal Co. v. United States*, 350 F. 2d 833 (3 Cir. 1965). In that case *McMahon* was followed as to the fixing of the time when the two-year time-bar began to run, but, in direct conflict with the opinion of our court in *States Marine Corp. v. United States*, *supra*, and the decisions following it (including the district court opinion appealed from in *Northern Metal*, 230 F. Supp. 38 (E. D. Pa. 1964)) the Third Circuit held that the running of this time-bar was tolled during the pendency of the administrative proceedings. The issue of such a possible tolling of the Tucker Act's six-year time-bar had not been comprehended within the thrust of appellant's contentions, see footnote 1; and that fact, together with the square conflict of the two circuits relative to the tolling of the Suits in Admiralty Act's two-year time-bar, caused the panel *sua sponte* to refer adjudication of the case to all the active judges.⁷

Though the more recent Suits in Admiralty Act appears in the U. S. Code, section for section, much as it was when adopted in 1920, and the various provisions, section for section, of the eighty-year old Tucker Act are split up, here and there, in Title 28 of the Code, both Acts of Congress are grants of rights to sue the Government, which, being the sovereign, has full immunity from standing any suit at all. As such, both Acts set forth the kinds of claims that may be brought, the courts within which these specified claims are to be litigated, and the length of time within which these specified claims may be presented after the

⁷ Appellant's action was commenced seven and one-half months after the six year jurisdictional limitation began to run, but if the time when administrative proceedings were pending is to be excluded from computation, the action was not time-barred.

cause of action arose, or accrued. These built-in limitations upon a more complete waiver of sovereign immunity spell out the ambit within which a would-be litigant seeking recovery from the sovereign must operate; in short, unless the would-be litigant operates within the area of the statutory grant, he is outside the jurisdiction the sovereign granted him, whether his cause of action is an impermissible one, he is in the wrong forum, or his time in which to act has expired.

Of the time-bar condition, we said in *States Marine*:

"The two year time-bar of the Suits in Admiralty Act is unlike a time-bar period prescribed under an ordinary Statute of Limitations. Under an ordinary time-bar statute a claim is not extinguished after the statutory period has elapsed. It is only unenforceable. The time-bar of the Suits in Admiralty Act renders a claim against the United States not only unenforceable but extinguishes the claim itself, for when the sovereign, immune from suit, consented to be sued it was made a condition of the right to sue that suits so authorized had to be brought within the time-bar period. *McMahon v. United States*, 342 U. S. 25, 72 S. Ct. 17, 96 L. Ed. 26 (1951); *Sgambati v. United States*, 172 F. 2d 297, 298, cert. denied, 337 U. S. 938, 69 S. Ct. 1514, 93 L. Ed. 1748 (1949).

"It therefore follows that despite any maritime contractual agreements that parties may enter into with the United States such contractual agreements may not extend the time-bar period of two years prescribed by Section 5 of the Suits in Admiralty Act within which suit against the United States may be commenced. *United States v. Wessel, Duval & Co.*, 115 F. Supp. 678 (S. D. N. Y. 1953). Accord, *Atlantic Carriers, Inc. v. United States*, 181 F. Supp. 1 (S. D. N. Y. 1955). Jurisdiction to hear a case brought at a later date than two years after the cause of action arose cannot be awarded to the court by agreement." 283 F. 2d 776, 778.

What we said in *States Marine* about the time-bar of the Suits in Admiralty Act applies to the time-bar of the Tucker Act. A Tucker Act claim is extinguished when the limiting time expires. The claim being extinguished, the court's jurisdiction is gone, and jurisdiction to adjudicate the claim cannot be conferred upon the court by any agreement.

Prior to the passage of the Tucker Act in 1887, a suit could be brought against the United States in the Court of Claims provided it was brought within six years after the right to suit had accrued. The Tucker Act, adopted March 3, 1887, awarded a claimant whose claim against the Government was for a sum under \$10,000 the right to present his claim to a specified United States District Court or Circuit Court "Provided, That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made." The provision of the Tucker Act granting grace to suitors to sue in a district court is now found in 28 U. S. C. §1346 (a) (2); the time-bar limitation is now found, since the 1948 edition of the Judicial Code, in 28 U. S. C. §2401 (a). These two subsections, each derived from the Tucker Act, should be read in connection with each other, Section 2401 (a) jurisdictionally limiting the exercise of the right to sue which the sovereign granted under 28 U. S. C. §1346 (a).

In October 1887, the same year that the Tucker Act was adopted, in deciding an appeal to the U. S. Supreme Court from a decision of the Court of Claims, Justice Harlan stated in *Finn v. United States*, 123 U. S. 227, 232-233, with reference to the permissive six-year period then, and now, applicable to that Court, the following:

The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the

United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims. Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous.

In *United States v. Greathouse*, 166 U. S. 601 (1897) the Tucker Act was construed, again by Mr. Justice Harlan. *Finn v. United States* was cited and followed. The Court held:

We may add that it was not contemplated that the limitation upon suits against the Government in the District and Circuit Courts of the United States should be different from that applicable to like suits in the Court of Claims. 166 U. S. at 606. (Emphasis supplied.)

Shortly thereafter, in *United States v. Wardwell*, 172 U. S. 48 (1898) the matter has been laid to rest in the Supreme Court for seventy years. Mr. Justice Brewer, beginning the opinion for the unanimous Court in that case stated, p. 52:

Section 1069, Revised Statutes, is not merely a statute of limitations but also jurisdictional in its nature, and limiting the cases of which the Court of Claims can take cognizance. *Finn v. United States*, 123 U. S. 227.

This "jurisdictional" interpretation of the six-year time-

bar has never been overruled by the United States Supreme Court. And the Court, consistent with this interpretation, has rejected the contention that the jurisdictional time-bar should not begin to run until after an administrative denial of a claimant's claim when that contention has been advanced on the theory that there is no ground for a suit in court until all administrative remedies have been exhausted. *Soriano v. United States*, 352 U. S. 270, 77 Sup. Ct. 269, 1 L. Ed. 2d 306 (1957).

Appellant states in his complaint that the decision of the Armed Services Board of Contract Appeals "is not entitled to finality under 68 Stat. 81, 41 U. S. C. §§321-322 for the reasons that it was capricious, arbitrary and not supported by substantial evidence . . ." Apparently this reference to the so-called "Wunderlich" Act of 1954 was intended to nip in the bud any government defense that this ASBCA decision was a final disposition of plaintiff's claims. Of course this reference in its complaint brought pursuant to 28 U. S. C. §1346(a)(2) is not construable as pleading a separate right to review that administrative result; and, too, as we have above stated, the fact of this decision has no bearing upon the accrual of plaintiff's right to sue. *Soriano v. United States*, *supra*; *McMahon v. United States*, *supra*; *States Marine Corp. v. United States*, *supra*; *Northern Metal Co. v. United States*, *supra*, at 836.

Even as we cannot accept February 28, 1963 as the date when appellant's claim accrued we also cannot accept November 14, 1962 as the date of accrual, the date the Government refunded the erroneously withheld prompt payment discounts. A refunding adjustment made years after the final delivery of goods and the submission of a voucher for payment of those goods is not a "final voucher" submitted by the contractor, and, as pointed out by the court below, appellant's right to sue accrued when its work was completed and its final voucher was submitted. See *B-W Construction Company v. United States*, 100 Ct. Cl. 227 (1943); *Austin Engineering Co. v. United States*, 88 Ct. Cl.

559; *Acorn Decorating Corporation v. United States*, 146 Ct. Cl. 394, 174 F. Supp. 949 (1959). As was said by the Court of Claims in *Pink v. United States*, 85 Ct. Cl. 121, *cert. denied*, 303 U. S. 642, 58 Sup. Ct. 641, 82 L. Ed. 1102 (1938):

... It has been repeatedly held by this court that under a contract to perform work, the completion and acceptance date starts the statute to run. It is the completion of the service called for under the contract, and not the date of any payment subsequently made.

Finally, it is clear that when Congress passed the Wunderlich Act that body did not intend to grant any new period of permissive delay within which the built-in six-year time-bar of the Tucker Act might be tolled. The House Committee Report is explicit on the point and demonstrates that Congress was fully aware of the established law and did not intend to affect it. H. R. Rep. No. 1380, 83rd Cong., 2d Sess. (1954), 2 U. S. Code & Ad. News, 2191, 2196 (1954), see *Cosmopolitan Mfg. Co. v. United States*, 297 F. 2d 546, 549 (Ct. Cl.), *cert. denied*, sub nom. *Arlene Coats v. United States*, 371 U. S. 818 (1962).

In view of the foregoing, we reiterate what we said in *States Marine Corp. v. United States*, *supra* at 779, and hold here that inasmuch as the six-year limitation is a restriction upon the jurisdiction of the district court, the running of the six-year time-bar could not be extended by the Disputes Clause agreement of the parties, or tolled during the period that appellant's claim was being administratively considered.

In general, see *United States v. Utah Construction and Mining Co.*, — U. S. — (June 6, 1966) and *United States v. Carlo Bianchi & Co.*, 373 U. S. 709 (1963), if a claimant is uncertain whether he should proceed at once with a Tucker Act suit or first submit a dispute, pursuant to his agreement, to the ASBCA, he may always protect himself by instituting a "protective suit" within the six-

year period permitted by the Tucker Act, staying its progress until after a final administrative decision, and then bringing it forward if the administrative decision is adverse to him.

The judgment below is affirmed.

FRIENDLY, *Circuit Judge* (concurring):

If the issue here were now arising in this court for the first time, I might well be persuaded to the position taken by Judge Freedman in *Northern Metal Co. v. United States*, 350 F. 2d 833 (3 Cir. 1965) and by my brother Anderson in dissent, rather than to that which we adopted in *States Marine Corp. v. United States*, 283 F. 2d 776 (2 Cir. 1960). But the issue is a close one on any view, there is much to be said for *States Marine*, and it derives considerable support from the language of *Soriano v. United States*, 352 U. S. 270, 274-75 (1957). That we are sitting *in banc* does not relieve us of the judicial obligation to pay proper heed to precedent; the question still is "not what we would hold if we now took a fresh look but whether we should take that fresh look," *Mississippi River Fuel Corp. v. United States*, 314 F. 2d 953, 958 (Ct. Cl. 1963) (concurring opinion of Davis, J.). Judge Davis' illuminating opinion identifies several factors that may justify this; when none of these exists, "respect for an existing precedent is counselled by all those many facets of stability-plus-economy which are embodied in the principle of *stare decisis*." The only thing in the picture now that was not before the *States Marine* panel six years ago is the Third Circuit's opinion in *Northern Metal*; valuable as that is, it can hardly be rated, to use Judge Davis' phrase, as "an intervening development in the law, or in critical comment, which unlocks new corridors." What it does do is to provide a ready handle for opening the door to correction, if we are wrong, by the only tribunal that can settle the issue once and for all. Supreme Court Rule 19.

ANDERSON, Circuit Judge (dissenting) :

I dissent. I do, however, agree with the majority that the period of limitations began to run on the date of the alleged breach of the contract. The claim for breach accrued at the latest on December 14, 1956, the date of the final delivery, which was more than six years prior to the commencement of this action. The Supreme Court decided in *McMahon v. United States*, 342 U. S. 25 (1951) that a seaman's claim for injuries accrued at the date of the injury, and not at the date when his claim was rejected by administrative officers.¹ A similar result has been reached

¹ In *McMahon* the Supreme Court left open the question of whether the statutory period there in question had been tolled, since a decision on that point would not have affected the result. 342 U. S. at 28.

in our own circuit in *States Marine Corporation of Delaware v. United States*, 283 F. 2d 776, 778 (2d Cir. 1960), and more recently by the Third Circuit in *Northern Metal Co. v. United States*, 350 F. 2d 833 (3d Cir. 1965).

I am of the opinion, however, that the decision below should be reversed because the limitations period was tolled during the pendency of the administrative proceedings required by the disputes clause.

As the Supreme Court stated in *Burnett v. New York Cent. R. Co.*, 380 U. S. 424, at 426 (1965),

"The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one of legislative intent whether the right shall be enforceable . . . after the prescribed time."

The Court went on to say at 427,

"In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act."

The statutes of limitations are statutes of repose, designed to put an end to litigation.

"The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when 'evidence has been lost, memories have faded, and witnesses have disappeared.'" Note, 63 Harv. L. Rev. 1177, at 1185 (1950).

See *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U. S. 342, at 348-349 (1944).

"This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights."

Burnett v. New York Cent. R. Co., *supra*, at 428. Thus courts have engrafted numerous exceptions upon statutory periods of limitations. See, e.g., *Urie v. Thompson*, 337 U. S. 163 (1949); *Bailey v. Glover*, 88 U. S. (21 Wall.) 342 (1874). The otherwise mechanical results, to which the unabated application of the limitations periods would lead, have thus been mitigated by familiar principles such as the one that a period of limitations is tolled until fraud is discovered. *Bailey v. Glover*, *supra*. Similarly it is accepted that,

"Where the plaintiff is prevented from finding timely suit by force of law, it is manifestly unjust to penalize him by barring the suit." 63 Harv. L. Rev. at 1233.

And in *Urie v. Thompson*, *supra*, the Supreme Court recognized that a claim for an injury caused by a slow and continuing process was not barred if brought within three years of *discovery* of the ailment. Finally, in other instances it is recognized that the principles of estoppel may

prevent a defendant from raising the defense of the statute of limitations, "when his representations or conduct have induced the plaintiff to forbear from prosecuting his known cause of action, and the limitations period has expired while the plaintiff continues to forbear." 63 Harv. L. Rev. at 1222. The application of these principles should not depend upon whether the statute of limitations involved is one which may be characterized as "substantive" or "procedural." Nor does the fact that a newly created right of action sprang from a waiver of sovereign immunity render the statute of limitations impervious to the application of those same mitigating considerations. In every case inquiry should be directed to the basic question of "legislative intent." *Burnett v. New York Cent. R. Co.*, *supra*. By making administrative proceedings a mandatory prerequisite to the seeking of relief in such cases from the courts, Congress did not intend that the statute of limitations would run during the pendency of those administrative hearings and deliberations.

Looking to the scheme of the Tucker Act, 28 U. S. C. §1346(a)(2) (1964 ed.), and the liberal purpose which it evinces to permit suits based upon contract claims to be brought against the Government, it would be anomalous to hold that the Government, through its power to make regulations, could require the inclusion in all of its thousands of procurement contracts of a mandatory provision that claims must first be processed through its administrative channels, and, by proceedings long drawn out, effectively defeat the rights of claimants to present their claims to a court of law. There is, of course, no doubt that the appellant was required first to proceed with, and exhaust, its administrative remedies before it could sue under the Tucker Act. See, e.g., *United States v. Joseph A. Holpuch Co.*, 328 U. S. 234 (1946); and *Northern Metal Co. v. United States*, *supra*, at 839, which says,

"Since the Government through its contracting officer and the Armed Services Board of Contract Ap-

peals not only was aware of the claim but was engaged in deciding its merits, it would be harsh and out of harmony with the purpose and intention of Congress to hold that the statutory time ran during the pendency of the administrative proceedings."

In this kind of case many of the factors which usually provide the basis for the rationale of the limitations periods are absent. By bringing its claim to the contracting officer within six years of its accrual, the appellant effectively gave the Government all the notice to which it was entitled. The administrative proceedings which were held had the effect of recording and preserving all of the relevant evidence. There is, therefore, none of the dangers against which the time bars are designed to protect. The Government is not being called upon to defend a claim after "evidence has been lost, memories have faded, and the witnesses have disappeared." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, *supra*, at 349. Indeed, prejudice will result only if the suit is not permitted, in the event of which the party to suffer will be the plaintiff. It is my opinion that *States Marine Corporation of Delaware v. United States*, 283 F. 2d 776 (2d Cir. 1960), which in cases of this kind operates harshly and unjustly, should be overruled.

I do not believe that the contractor's ability to bring a protective suit is a satisfactory solution to the problem. Such a procedure would inevitably lead to the defeat of many legitimate claims in the cases of claimants who are unaware of the need for bringing such protective actions. Furthermore, it would have the unfortunate effect of increasing the burden of the district courts by causing still more crowding of already crowded dockets with lawsuits which will languish for years during the pendency of administrative proceedings, and which in all probability will never come up for trial. Therefore, as a matter of sound judicial administration the requirement that a protective suit be commenced within the period of limitations has little to commend it.

The statutory period of limitations (28 U. S. C. §2401(a) (1964 ed.)), which is applicable to the Tucker Act, should be held to be tolled during the pendency of the administrative proceedings required by the "disputes" clause.² This does not mean that a contractor may indefinitely put off the time of suit. "On the contrary, the time would run during the contractor's delay in presenting the dispute and would be tolled only during its pendency before the contracting officer and the Armed Services Board of Contract Appeals, a period which is in the control of the Government's employees and not of the contractor." *Northern Metal Co. v. United States*, *supra*, at 839. Because the appellant commenced its administrative petition within the six year period and because its suit, if allowance be made for a tolling of the statute during the administrative proceedings, was brought within the statutory period, the present action was timely brought. "... [P]laintiff has not slept on his rights but, rather, has been prevented from asserting them." *Burnett v. New York Cent. R. Co.*, *supra*, at 429.

² Cf. *Carnation Co. v. Pacific Westbound Conference*, 383 U. S. 213 (1966), where, in another context, the Supreme Court, in a dictum stating that it was error to dismiss an action which the Court of Appeals had decided should have been presented first to an administrative tribunal, noted that:

"Such claims are subject to the Statute of Limitations and are likely to be barred by the time that the . . . [administrative agency] acts. Therefore, we believe that the Court of Appeals should have stayed the action instead of dismissing it." 383 U. S. at 223.

While the subject matter in *Carnation* is certainly different from the one which is now before our court, nevertheless the same considerations apply and dictate that the Statute of Limitations should be tolled during the pendency of the administrative proceedings before the ASBCA.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
CROWN COAT FRONT Co., INC.

v.

UNITED STATES OF AMERICA

Endorsement

63 Civ. 2281

This suit seeks to recover for an alleged breach of Armed Services contract, No. QM-7796 of May 14, 1956, for canteen covers. Plaintiff and defendant both move for summary judgment.

Complaint is dismissed because suit is barred by the Statute of Limitations.

The canteen covers contracted for were to be lined with mildew resistant felt of certain specifications. The contract also provided that the Government could inspect and test "raw materials—and end products" (General Provisions, page 1) prior to final acceptance, and when found to be defective in "material or workmanship or otherwise not in conformity with the requirements of this contract", the "Government shall have the right either to reject them or to require their correction." (General Provisions, page 1). Some samples of felt, purchased by plaintiff for use on the contract from Western Felt Works, were rejected after test by defendant for not containing contract quantities of various mildew inhibitors. Before defendant would allow plaintiff to use the rejected felt on the contract, defendant required plaintiff to consent to contract price reductions of \$270.01. Final delivery of the canteens was made by plaintiff on December 14, 1956. (The contract stated that final delivery was to be made by October 12, 1956.)

Plaintiff alleges that it was not until March 20, 1959, that "defendant informed plaintiff" that it had performed Colorimetric and Ferric Chloride tests in determining the percentage of mildew inhibitor but had not performed a

Parr Chloride test. Plaintiff contends that the above two tests were not provided for by contract QM-7796, and, therefore, there was a change in contract specifications and a breach of contract. After being told which tests were performed on the samples, plaintiff exercised its rights under the "Changes" Clause of contract QM-7796 and demanded that the Contracting Officer grant a refund of the price reductions and compensation for increased costs occasioned by the delay resulting from defendant's rejection of the samples.

Paragraph two of contract QM-7796 provides:

"Changes. The Contracting Officer may at any time . . . make changes within the general scope of this contract, in any one or more of the following: (1) . . . specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; . . . If any such change causes an increase or decrease in the cost of . . . performance or the contract, an equitable adjustment shall be made in the contract price . . . *provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes". . . ."

On February 21, 1962, the Contracting Officer rendered findings in which he stated that the Government had employed "an established commercial method" in testing for the mildew inhibitor content of the felt and held that plaintiff was not entitled to an increase in price under the contract. Pursuant to the "Disputes" Clause, paragraph 12 of contract QM-7796, plaintiff filed an appeal to the Armed Services Board of Contract Appeals (ASBCA),

which held a full hearing and on February 28, 1968 rendered a decision holding that plaintiff was not entitled to increased compensation.

"12. *Disputes.* Except as otherwise provided in this contract, any dispute concerning a *question of fact* arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing etc. . . . Within 30 days from the date of receipt of such copy, the contractor may appeal . . . to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive. . . ."

Plaintiff now claims that it is entitled to an equitable adjustment of the contract price and demands judgment against defendant for \$9500 or such amount not exceeding \$10,000 as this Court may deem just and equitable. Plaintiff contends that the decision of the ASBCA is not entitled to finality because the question before the Court is not properly within the "Disputes" Clause, and because the ASBCA's action was "capricious, arbitrary, and not supported by substantial evidence, and concerned questions of law."

We do not deem it necessary to determine if the question before us is properly within the "Disputes" Clause or to examine the record of the proceedings before the ASBCA, because the action is barred by the Statute of Limitations.

28 U.S.C. §2401(a) provides:

"§2401. *Time for commencing action against the United States.*

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. . . ."

The essence of plaintiff's complaint is based on the alleged use by the Government of unwarranted tests and the

consequent rejection of felt. This inspection and rejection occurred prior to October 1956; however, neither party contends that this is the date when the claim should be deemed to accrue.

Defendant urges that the claim sued on legally accrued at the latest on December 14, 1956, when plaintiff completed all deliveries of canteen covers under the contract, and that, therefore, this action, filed on July 31, 1963, is barred by the six-year Statute of Limitations.

Plaintiff contends, however, that if this suit be predicated on a question of law the claim did not accrue until November 14, 1962, when defendant made the last payment under the contract, and if the action is based on a question of fact and is within the "Disputes" Clause, plaintiff had no enforceable claim until February 28, 1963, when the ASBCA rendered its decision. Neither of plaintiff's contentions has merit.

The first contention is based on the fact that defendant transmitted to plaintiff certain "prompt payment discounts", which the ASBCA (in a different hearing than that discussed above) held that defendant should not have withheld from plaintiff. Plaintiff cites *B-W Construction Company v. United States*, 100 Ct. Cl. 227 (1943) to support his contention that the Statute of Limitations did not begin to run until the Government paid the above "prompt payment discounts". The Court in *B-W Construction Company* stated that:

"The defendant says that the statute began to run on the date the defendant occupied the building, but it is clear under our decisions that it did not begin to run until the work was finally completed and final voucher was presented. *Pink v. United States*, 85 Ct. Cl. 121; *Austin Engineering Co. v. United States*, 88 Ct. Cl. 559."

A "final voucher was presented" when plaintiff completed work and deliveries on December 14, 1956. The dis-

pute over manner of payments cannot be considered as affecting the time when a "final voucher was presented."

Another case cited by plaintiff bears out the above observation. In *Acorn Decorating Corporation v. United States*, 146 Ct.Cl. 394, 174 F. Supp. 949 (1959), the Court stated (at 951, 398):

"It should also be noted that final payment was made to plaintiff more than six years from the date of the suit with the exception of \$100. Plaintiff contends that since the \$100 was finally paid within the 6 year period its claim accrued as of that time, citing *B-W Construction Co. v. United States*, 100 C. Cls. 227 and *Austin Engineering Co. v. United States*, 88 C. Cls. 559. There is no merit in this contention. The gravamen of these cases is that a cause of action accrues upon a contract when the work is completed and a final voucher presented. See also *Pink v. United States*, 85 C. Cls. 121, cert. denied 303 U.S. 642, wherein it was said:

"... It has been repeatedly held by this court that under a contract to perform work, the completion and acceptance date starts the statute to run. It is the completion of the service called for under the contract, and not the date of any payment subsequently made.' "

We conclude that if this claim sued upon is based on a question of law, it is barred by the Statute of Limitations, because plaintiff completed the work, presented its final voucher, and the work was accepted by the Government more than six years prior to filing suit.

Likewise, if the suit is based on a question of fact and is within the "Disputes" Clause, we find that the Statute of Limitations was not tolled during the period of administrative procedures. Plaintiff cites *Acorn Decorating Corporation v. United States*, *supra*, to support his contention. In the case cited, however, the plaintiff had not exhausted his administrative remedies because he failed to appeal an adverse decision to the Secretary of the Army. Therefore, the

Court stated that even if plaintiff's contention that the claim did not accrue until the "adverse decision was rendered" by an administrative body were true, plaintiff was still barred for not exhausting his administrative remedies. Contrary to plaintiff's contention, the law is that the pursuit of an administrative remedy does not toll the Statute of Limitations. See *States Marine Corp. of Delaware v. United States*, 283 F. 2d 776, 779 (2d Cir. 1960); *Cisatlantic Corp. v. Brownell*, 131 F. Supp. 406 (S. D. N. Y. 1953), aff'd per curiam, 222 F. 2d 957 (2d Cir. 1955); *Leonick v. Jones & Laughlin Steel Corp.*, 151 F. Supp. 795 (E. D. N. Y. 1957), aff'd 258 F. 2d 48 (2d Cir. 1958); *Fattore v. United States* 312 F. 2d 797 (Ct. Cl. 1963). In the *States Marine Corp.* case, the Court held that plaintiff's claim was barred by the two-year time-bar of the Suits in Admiralty Act even though the delay in bringing the action resulted from the pursuit of administrative adjudication, which was required by plaintiff's contract with the Government. Included in the contract was almost the identical "Disputes" Clause involved in the contract herein. *States Marine Corp.* submitted its claim to the Contracting Officer and then appealed to the ASBCA just as has been done here.

We find that this suit is barred by the Statute of Limitations and is dismissed. The Clerk is directed to forthwith enter judgment of dismissal on the merits with costs; and it is so ordered.

SYLVESTER J. RYAN
U.S.D.J.

Dated: January 29, 1965.